No. 2727.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALASKA MEXICAN GOLD MINING COMPANY,
a Corporation,
Plaintiff in Error,

vs.

TERRITORY OF ALASKA,
Defendant in Error.

PETITION FOR REHEARING.

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Comes now the plaintiff in error and respectfully petitions the Court for a rehearing herein, upon the grounds and for the reasons hereinafter enumerated:

I.

It was contended upon the hearing that the Act of the Territorial Legislature, which forms the basis of this action, created no civil liability and could not therefore form the basis of a civil proceeding. The Court held, however, that under the Act there was a duty to pay the amount of the license tax imposed and that for this reason a civil proceeding might be brought to enforce the payment of the amount which

it was the appellant's duty to pay, a subsequent act of the Legislature having provided a civil remedy for the recovery of all taxes due and owing. If the provisions of the Act were such that a license would issue as a matter of course upon the payment of the money demanded as a license tax, the situation would be as pointed out by the Court.

We desire, however, to direct the attention of the Court to the peculiar provisions of the Act. The Act provides that it shall be an offense to carry on the business of mining without first applying for and obtaining a license, as in the Act provided. It is then provided that the applicant shall make an application to the Court or Judge, which shall be filed with the Clerk and by him presented to the Court or Judge, together with such recommendations for and remonstrances against the granting of the license as shall have been filed. The Court then acts upon this application and either grants or refuses the license and the Clerk can only issue the license after the Court has made an order permitting it to be issued.

The license, therefore, required under this Act is not a mere receipt for taxes paid as is the case where the license issues as a matter of course upon the payment of the money, but it serves to confer a privilege upon the licensee which may be either granted or withheld, depending upon the action of the Court. The license does not differ in principle from the license required from liquor dealers under the Fed-

eral License Laws in force in the Territory. The applicant must apply to the Court and present his recommendations and others may file remonstrances, and the Court must act thereon.

In the case of liquor licenses, the procedure is very similar. It is true that certain additional restrictions are imposed in connection with the issuance of liquor licenses, but this does not alter the fact that in either case the license may be granted or withheld.

This brings the case within the language employed by Judge Gilbert in rendering the decision of this Court in the case of *United States* vs. *Jorden,* 193 Fed., 986. In that case Judge Gilbert says:

> "The case at bar is unlike that of *United States* vs. *Chamberlain,* 219 U. S., 250, in which it was held that an action would lie by the United States to recover the amount of a stamp tax payable under the War Revenue Act of June 13, 1898, upon the execution of a conveyance. The present action is not one to recover a tax imposed upon the performance of an act which all persons are permitted to perform, and which in itself is not in any way regulated or restrained, but it is an attempt to recover fee which the law prescribed as one of the conditions upon which might be obtained the permission to engage in a specified business which is declared by law to be unlawful without that license."

Judge Gilbert here states the situation exactly. The offense of the appellant under the Alaska Act does not consist in a mere failure to pay the license tax imposed, but it consists in its failure to obtain the

permission of the Court or Judge to carry on its business. Without this permission it could not obtain a license.

II.

It was further contended upon the presentation of the cause to this Court, that the Act was void for the reason that it was impossible to comply with it. The Act makes it an offense to prosecute or attempt to prosecute the various lines of business referred to without first applying for and obtaining a license so to do from the District Court or subdivision thereof in the Territory, and paying for the license the amount indicated.

Section 2 of the Act again provides not only that the license must be applied for and obtained, but also paid in advance. The language of Section 2 bearing upon this question is as follows:

> "That any person, corporation or company doing, or attempting to do business in violation of the provisions of this Act, or without first having paid the license therein required, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined, etc."

It must, of course, be conceded that one engaged in mining could not pay a license tax of one-half of 1% on his income for the succeeding year, in advance, since the amount of his income could in no way be determined. But the Court held that he might comply with the law by filing an application for a license

and receiving a license upon the filing of such application and paying therefor at the end of the season when the amount of his net income could be determined.

If the language of the Act were such as to admit of this procedure and method of payment, if there were anything in the Act that would permit the Clerk to issue a license before the amount had been paid, and the applicant to carry on his business without payment until the end of the year, the conclusion reached by the Court would, of course, be a correct one.

But it appears to us that the mandates of the Act are clear and explicit and that the language employed is such as to leave no room for construction.

The Act first provides that any person, etc., prosecuting or attempting to prosecute any of the lines of business enumerated "shall first apply for and obtain a license so to do."

Section 2 provides that the license shall be issued by the Clerk and that the Clerk of the Court in each division shall give a bond in such amount as the Treasurer of the Territory may require, conditioned that he will pay out the moneys collected by him in the manner provided for in the Act.

Section 3 provides:

> "That any person, corporation or company doing, at attempting to do, business in violation of the provisions of this Act, or without first having

paid the license therein required, shall be deemed guilty of a misdemeanor."

In this connection we desire to call the Court's attention to two points: First, no authority is vested in the Clerk to issue a license without the payment of the license tax, nor is any authority vested in the Court or Judge to order the issuance of such a license without the payment of such tax, nor could a Clerk be expected to issue such license unless the tax were first paid, for if he should do so and the tax was not paid at the close of the season, he would undoubtedly be personally liable for the amount. A license could not, therefore, be obtained from the Clerk without the payment of the tax.

Second, the Act not only provides that a license must be obtained, but also that the tax must be paid, and unless both of these conditions are complied with under the express and explicit terms of the Act, the person so failing to comply therewith becomes guilty of a misdemeanor and subject to the numerous penalties imposed.

There is no provision under which the person engaging in business without first paying for the license could protect himself against prosecutions under the Act. The law does not authorize any one to issue the license unless it is paid for, and even if a license were issued without its being paid for, the licensee would not be protected, because the Act clearly de-

clares him guilty of a violation unless he also pays the amount required.

We, of course, fully agree with the Court that all Legislative Acts should receive a reasonable construction with a view of carrying out, if possible, the intent of the Legislature. But it appears to us that the adoption of the method of procedure and payment pointed out by the Court would be more than placing a construction upon the language of the Act, that it would be adding something to the Act that is not there, and that this something so added would be repugnant to the spirit as well as the express provisions of the Act.

In this connection it must be further borne in mind that the Act is not only penal in its nature, but also is an Act relating to the collection of taxes. Penal acts are all strictly construed and this is likewise true of acts relating to the collection of taxes. But whether a strict rule of construction or a liberal rule were adopted, we would, of course, not be authorized to eradicate from the statute things clearly expressed therein and substitute something else in the place thereof, and it appears to us that it is necessary to do this in order to follow out the method of procedure and payment indicated by the Court.

If our position in this regard is the correct one, it follows, of course, that the Act cannot be complied

with and is therefore void. As is said by Sir William Blackstone, Volume I, page 91:

> "Acts of Parliament that are impossible to be performed are of no validity."

III.

The Act of the Territorial Legislature requires the applicant to file an application for a license, which application, together with the recommendations for the granting of the license and remonstrances against the granting of it, are submitted to the Court or Judge, who is directed to act therein and either grant or refuse the license, and the Clerk is directed to act upon the order of the Court in issuing a license.

It was contended upon the hearing that since this Act empowered the Court or Judge in passing upon these recommendations and remonstrances to refuse an applicant a license to conduct a business lawful in itself, such as mining, the Act was void. In support of this contention we referred the Court to the case of *Yick Wo* vs. *Hopkins,* 118 U. S., 356. In that case an Ordinance of the City of San Francisco empowering the Board of Supervisors to grant or withhold a permit or license to run a laundry in a wooden building, was held void. It was contended that the case above cited was on all fours with the case at bar, in that in one case the Board of Supervisors had the arbitrary power to deprive a person from operating a laundry, which was held to be a

lawful business, and in the other case the Court or Judge is endowed with the arbitrary power to prevent a person from operating a mine, a business equally lawful as that of operating a laundry.

The Court held, however, that in view of the fact that the appellant had made no application to the Court for a license, it was not in position to urge the invalidity of the Act, because of the fact that it conferred upon the Court this unusual power. It is, of course, true that not having made an application the appellant is not in a position to complain of any action taken by the trial Court in granting or refusing a license, but if the Legislature could not confer upon the Court or Judge this arbitrary power of granting or refusing a license to one seeking to engage in a business lawful in itself, and a license cannot be obtained as is the case under the Act of the Territorial Legislature, without submitting to the exercise of this arbitrary power, the whole act by which a license is required to be obtained in this manner, it seems to us, cannot be other than entirely void, and if so, it could be disregarded. Our objection is not to any action taken by the Court but to action taken by the Legislature.

To illustrate, every one operating a laundry in San Francisco at the time the invalid ordinance referred to by the Supreme Court in the case cited was in force, would not be required to ask the Board of Supervisors for a permit or license to operate a laun-

dry. Such a one would have a right to ignore the ordinance entirely. So also in the case under discussion. The Legislature had no power to confer on a Court or Judge the authority to either grant or withhold permission to conduct a lawful business, and since it had not that power, any act attempting to confer such authority would be void, and being void, we think no one would be obliged to make any attempt to comply with it.

IV.

We next urge the point that the law under discussion violated the 14th amendment, in that it exacted from the plaintiff in error a tax not exacted from others similarly situated. This point was not passed upon by the Court in rendering the decision.

It was urged that since the law requires those engaged in mining to pay one-half of 1% on their net incomes, the tax required was an income tax and that since no income tax is required from those engaged in any other pursuits, the Act discriminated against persons engaged in mining in favor of those engaged in other pursuits. It was urged that mining as a business did not differ in any respect from any other equally lawful and legitimate business and that persons engaged in mining were therefore similarly situated with those engaged in other pursuits and that being similarly situated with such others it would be an unlawful discrimination to impose upon those en-

gaged in mining a tax that is not imposed upon any of the others. The case upon this point we think is controlled by the case from Hawaii, cited and discussed in the brief and decided by this Court.

V.

It was next contended that the tax sought to be exacted was an income tax and laid in violation of the provisions of the Organic Act which provides that:

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessments shall be according to the actual value thereof."

This contention so made was not passed upon by the Court in rendering the decision. It was contended in this connection that the tax was not uniform upon the same class of subjects, in view of the fact that it was assessed only against those engaged in mining. And furthermore, that the Organic Act would not permit the Legislature to place each individual operator in a class by himself as it did in this case.

Under constitutional provisions of this character it is not necessary that taxes levied should be uniform and equal upon all persons whatsoever, but they must be uniform upon the same class of subjects, that is to say, those subject to taxation must be classified, or in other words they must be grouped and each class or group must be similarly taxed. Here no attempt at

classification is made. Each individual operator is required to pay a different tax, depending upon his income.

It was further contended that the income tax so levied also violated the further provision of the Organic Act that all taxes must be assessed according to value.

This whole question was discussed by us in the brief on pages 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67 and 68, and we will at this time only direct the Court's attention to two cases that are on all fours with the case at bar.

In the case of *Banger's Appeal,* 109 Pa. St., 79, one of the identical questions now before this Court was before the Supreme Court of Pennsylvania. The Constitution of Pennsylvania contained a provision that all taxes should be uniform upon the same class of subjects, but it contained no provisions requiring assessments to be according to value. In that case the City of Williamsport, by an ordinance, sought to collect a tax in all respects like the tax sought to be collected here. The tax was called a license tax and the amount which each person was to pay was in each case determined by the income of the person taxed.

The Court held in the first place that notwithstanding the fact that it was called an occupation tax, the tax was in fact an income tax, and that regardless of its character it was not uniform upon the same class of subjects and was therefore void in

that it failed to comply with the constitutional requirement in that regard.

The Court discussed at some length the manner in which occupation taxes could be levied so as to comply with the constitutional requirement of uniformity and pointed out clearly why the tax in question did not answer this requirement, and in referring to the opinion expressed by the lower Court where it was held that the tax complied with the uniformity requirement, the Supreme Court say:

> "These views of the learned Court are well enough as far as they go, but they do not come to the proper standard of uniformity. However they might have been regarded prior to the adoption of the present constitution, they do not conform to the requirements of the Organic Law as it exists at the present time. That requires not merely that there shall be no exemption of persons or classes, but that upon persons and classes the tax shall be uniform. Thus in levying a tax upon 'occupation' a tax of $100 upon every person having a known occupation would be uniform, but what uniformity is there in laying an occupation tax of $100 upon A and a like levy of $200 upon B, the occupation of each being similar?"

And again in the course of the opinion it is said:

> "It may be asked how an occupation is to be assessed and how is the constitutional mandate to be complied with? The answer is not difficult. A tax of $100 upon all occupations would be uniform. We are at once confronted with the objection that it would be unjust to tax the occupation of a laborer the same amount as a merchant,

a physician or a lawyer. The injustice of such an exercise of the taxing power may be conceded without in any degree impairing the force of the argument. The objection is one that appeals more to the Legislative than to the Judicial department of the Government. The proper result may possibly be reached by classification. Thus it may be that physicians, lawyers, clergymen, merchants, bankers, manufacturers, mechanics, etc., etc., may be classified and a uniform occupation tax assessed upon each class, but it will not do to tax one member of a class $100 and another member of the same class $1000 upon a supposition or even upon the fact that one earns more than the other. An occupation tax is peculiar in its character. It is not a tax upon property, but upon the pursuit which a man follows in order to acquire property and support his family. It is a tax upon income in the sense only that every other tax is a tax upon income. That is to say, it reduces a man's clear income by the precise amount of the tax, but it is an income tax in no sense."

And with reference to the other point that the tax, although denominated an occupation tax was in fact an income tax, the Court say:

"This brings us at once to a vice underlying the whole case. Under the guise of an occupation tax the City of Williamsport has levied and is seeking to collect an income tax."

Another case on all fours is the case of *State* vs. *Cook,* 36 Atl., 892. The Constitution of the State of New Jersey provided, as does the Alaska Organic Act, that all property should be assessed for taxes at its true value. The Legislature of New Jersey laid

a tax on mines assessed according to their income. This is exactly what the Alaska Territorial Legislature did. The Supreme Court of New Jersey held that if mines were taxed their actual value must form the basis for taxation, regardless of the income, in order to comply with the constitutional provision that property must be assessed according to value. In passing upon that point the Supreme Court of New Jersey say:

> "That income is a criterion for valuation is peculiarly inapplicable to the taxation of mining property, in relation to which each year's income represents to that extent a diminution in the actual intrinsic value of the property."

A number of other cases are also cited and discussed in the brief. Many cases were referred to in relation to the point that the fact that the tax was called a license tax does not make it such, but that being levied on the income, resulting from the mining operations, it was in fact an income tax and not a license tax. And it was further pointed out upon the authority of the income tax case that an income tax upon mining was a tax on the mines from which the income was derived.

Whatever, therefore, might be the power of the Legislature to exact a license tax, and whatever may be the law upon the further question of whether license taxes must comply with the constitutional requirements of uniformity, and assessment according to

value, this tax was not a license tax. Upon this point the decisions referred to in the brief, including those by the Supreme Court of the United States, are entirely harmonious, and not being a license tax it would in any event be required to be uniform and assessed according to value. This matter, together with the authorities bearing thereon, was quite fully discussed in the brief and for that reason will not be further inquired into in this petition for a rehearing, but since the point was not referred to in the decision we especially direct the Court's attention to it.

VI.

We now come to the principal point upon which we petition the Court for a rehearing herein. The Organic Act contains among others the following limitations upon the taxing power:

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws and the assessments shall be according to the actual value thereof."

It was pointed out in the brief that the tax sought to be imposed by the Territorial Legislature which forms the subject of this action, was not uniform upon the same class of subjects and was not assessed according to value, and therefore violated these provisions of the Organic Act.

The Constitutional provisions in all the States where provisions similar to those contained in the Alaska

Organic Act obtained, were quoted, and the decisions under each of these provisions discussed. It was pointed out that many of these Constitutional provisions, unlike the provisions of the Organic Act for Alaska, expressly limited the application of the doctrines of uniformity and assessment according to value, to property taxes, so that these provisions did not, when so limited, apply to license taxes which are generally regarded as taxes not upon property but upon occupations. It was further pointed out that in some cases express constitutional authority was conferred to collect license taxes, that is to say, license taxes were authorized by express mention, and that because of this the various provisions of the Constitution could not be given effect as a whole unless it was held that license taxes did not come within the provision requiring assessment according to value, because these taxes could not be so assessed. Hence a decision to the effect that they must be assessed according to value would entirely avoid the grant by express mention in the Constitution of the power to lay such tax.

It was further pointed out that this state of facts led to a line of decisions in which it was held that license taxes need not be assessed according to value. In these States, however, the decisions are to the effect that license taxes must be uniform upon the same class of subjects for the reason that this is a provision with which they could comply, so that this requirement

could be imposed upon license taxes without avoiding the express grant to levy such taxes. It was further pointed out that in all the States where no grant by express mention to levy license taxes existed, and where the Constitutional provisions requiring uniformity and assessment according to value, were not limited in express terms to property taxes, the Courts uniformly held that license taxes could not be imposed unless they complied with the limitations of the Constitution imposed upon the taxing power. If these limitations required uniformity, license taxes were required to be uniform, and if they required assessment according to value, license taxes were required to be assessed according to value, and if not so assessed they were not sustained.

But the Court in this case expressed the opinion that the Organic Act contained an express grant to impose a license tax, or what was equivalent to an express grant to impose such a tax.

In passing upon this particular point, the Court in their opinion use this language:

> "We take it to be undisputable that the creation of revenue by the imposition of license taxes upon carrying on of business is in a general sense a rightful subject of legislation, but in this matter inquiry into the general question is unnecessary, for as already pointed out we have express transfer of authority to the Territorial Legislature to impose license taxes. The power, therefore, being in the Legislature, such taxes may be imposed

> without the restrictive limitations which must control in levying taxes upon property in its usual sense."

We think the Court received the wrong impression from the language employed in the Organic Act. This language, while it recognizes the right by express mention to impose licenses, does not authorize the Territorial Legislature by express mention to impose license taxes.

The provision referred to reads as follows:

> "provided that this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses."

This provision was a mere proviso inserted with a view of preventing misconstruction, but as this Court said, and we think correctly, it recognized the existence in the Territorial Legislature, of the right to impose taxes or licenses. Independent of such recognition by the Organic Act, however, we agree with the Court that the general clause extending the powers of legislation to all rightful subjects of legislation, include the power to levy taxes of any character, provided, however, that these taxes comply with the requirements of uniformity and assessment according to value, elsewhere expressly provided for in the Organic Act itself.

We also think that under the clause permitting the Legislature to deal with all rightful subjects of legislation, it had power to exact licenses in the exercise

of the police power for the purpose of regulation, and that these licenses, so long as their object was not revenue, but were merely imposed for regulation under the police power, were not subject to the limitations imposed upon the exercise of the taxing power.

But we do no think that the recognition of the right to impose other and additional taxes or licenses expressly recognizes the right to impose license taxes. Taxes are one thing and licenses are quite another thing. Taxes are exactions made by the Government for the purpose of raising revenue, and licenses are permits issued to licensees to do those things which would, without such permission, be unlawful. Their object is not the production of revenue, as is the case with taxes, but their object is regulation under the police power.

A license tax is a tax imposed in the exercise of the taxing power and its object is to raise revenue. It does not differ from a property tax in character, except that the subject of taxation is not property, but this or that occupation, and while the right to impose taxes would include the right to impose license taxes, a grant of a right to tax is not an express grant of a right to impose a license tax, that is to say, a grant by express mention, so that the limitations contained in the Organic Act upon the taxing power, where those limitations are as in the case of the Alaska Organic Act, made applicable to all taxes, would have to be held inapplicable in order to give the entire

Organic Act effect. Nor is the recognition of the right to require licenses in any sense a recognition of the right to require or impose license taxes. A license is one thing and a license tax is quite a different thing. The former is exacted under police power and the latter under taxing power. The object of one is regulation while that of the other is revenue. They bear no relation to one another and a grant of power to exact or impose one does not include the right or power to impose the other.

The authorities are uniform upon the subject that a grant of power to exact a license does not authorize the imposition of a license tax.

As is said by Judge Cooley on page 1138 of *Cooley on Taxation:*

> "The terms in which a municipality is empowered to grant licenses, will be expected to indicate with sufficient precision whether the grant is conferred for the purpose of revenue or whether on the other hand it is given for regulation merely. It is perhaps impossible to lay down any rule for the construction of such grants that shall be general and at the same time safe, but all delegated powers to tax are to be closely scanned and strictly construed. It would seem that when a power to license is given, the intendment must be that regulation is the object, unless there is something in the language of the grant or in the circumstances under which it is made indicating with sufficent certainty that the raising of revenue by means thereof was contemplated."

So also in the case of *Sunset Telephone Company* vs. *Medford,* 115 Fed., 202, it was said:

> "This is a revenue provision, and is not within the authority conferred upon the city by its charter. 'The power to license, as a means of regulating a business, implies the power to charge a fee therefor sufficient to defray the expense of issuing the license, and to compensate the city for an expense incurred in maintaining such regulation. *Whenever it is manifest that the fee for the license is substantially in excess of what it should be, it will be considered a tax,* and the ordinance imposing it void.'"

In the case of *Clark* vs. *Brunswick,* 43 N. J. L., 175, the Court, speaking with reference to a grant of power to impose a license, say:

> "Under such grant of power it has been repeatedly held in this State the right to taxation for revenue purposes is not conferred.
>
> "It is purely a police power and must be exercised for the purpose of regulation."

and again it is said:

> "When authority is given to require the possession of a license as a condition for selling, a reasonable fee, to cover probable expense can be demanded, but the exaction of sums in excess of such expenses and graduated by the amount of business done can be nothing else but a tax upon such business."

So also in the case of *Cache County* vs. *Jensen,* 61 Pac., 309, the Supreme Court of Utah say:

> "So a right to license a business or occupation does not imply a right to exact a tax merely for revenue and where the object is revenue, the power to license for that purpose must be conferred in unequivocal terms. 'License' in general implies privilege and regulation and imposition of it falls within the police power of the State."

Again, when the whole Organic Act is considered, and every part of it is read in connection with other parts bearing upon the same subject, it becomes very apparent that it was not the intention of Congress to confer upon the Legislature of Alaska power to impose a license tax without regard to the limitations imposed upon the taxing power. Every power conferred is hedged about by limitations and this is especially true of the taxing power. Not only is it provided that all taxes shall be uniform and assessed according to value, but a further provision occurs which provides as follows:

> "No tax shall be levied for territorial purposes in excess of 1% upon the assessed valuation of property therein in any one year, nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of 2% of the assessed valuation of property within the town in any one year."

And Section 9, which contains the limitations upon the taxing power, also contains this provision:

> "And all laws passed or attempted to be passed by such Legislature in said Territory, inconsistent with the provisions of this section, shall be null and void."

Here then is an express declaration by Congress that all laws passed that are in conflict with this particular section, irrespective of the remaining portions of the Organic Act, shall be null and void.

Now, what does this section provide? It provides firstly, that all taxes must be uniform upon the same class of subjects, and secondly, that all taxes must be assessed according to value.

Now a license tax must conform to the provisions of that section. If it cannot do this, it cannot be imposed at all, for legislation that does not comply with the provisions of this section is void, and because of the express language contained in the section itself, to that effect, this section must be construed by itself, without reference to any other provisions in the Organic Act.

Again, what do all these limitations imposed upon the taxing power indicate? They indicate, if they indicate anything, that it was the purpose and object of Congress to protect the people of Alaska against over-taxation, as well as against unjust and unequal taxation. A provision is inserted that no tax should be levied for territorial purposes in excess of 1%

on the assessed valuation of property therein in any one year. No tax shall be levied for municipal purposes in excess of 2%. Yet if a license tax could be imposed without complying with these provisions, why insert these provisions at all? Surely it was not the object of Congress merely to protect idle property against over-taxation and leave industry without any protection against the same evil. If license taxes can be imposed, notwithstanding these limitations upon the taxing power, each and all of these limitations become meaningless and valueless. The only taxes levied in the territory are license taxes, and as pointed out in our brief, these taxes are so levied that they fall almost exclusively upon certain localities. If it had been the intention of Congress that the Legislature should have power to levy license taxes in disregard of the provisions of the 9th Section, it would not only have said so in express and unequivocal language, but it would have pointed out clearly the extent to which these license taxes could be imposed. The whole matter would not have been left open, so that the entire tax of the Territory could be assessed against one or two industries and to the practical exclusion of all others, nor would it have left the matter in such shape that in imposing a tax on those engaged in mining, all those whose net income did not exceed $5000 would be exempt, the practical effect of which, as we have pointed out in our brief, is that the quartz mines of the Coast are obliged to bear

nearly all, if not all, the taxes assessed against the mining industry.

This is unfair and unjust and is it reasonable to presume that since Congress placed so many limitations upon the power of the Legislature with a view of protecting the people of Alaska against unwise legislation, and placed upon the taxing power limitations that are not found in any other Constitution, it would have protected industry in the Territory against the very vice of which we now complain. It would have provided specifically what industries could be made subject to a license tax and it would have guarded against abuse of the power conferred by throwing about it suitable limitations.

In view of the foregoing we think it clear that the proviso providing that the Legislature may impose other and additional taxes or licenses could not be construed as an express grant or an express recognition of the power to impose license taxes, even if there were no other authority upon the subject. For, as Judge Cooley says in his work on Taxation, 3rd Edition, 1139:

> "All delegated powers to tax are to be closely scanned and strictly construed."

It seems to us to be clear that it was the intention of Congress to protect the people of Alaska against unequal or burdensome taxation, and that this intention cannot be carried into effect if the Organic Act

is so construed as to permit the assessment of license taxes, in whatever manner and to whatever extent the Legislature may see fit.

There is one point to which we did not call the Court's attention upon the hearing, for the reason that it was at that time overlooked by us, and that is found in the provision contained in Section 9, to which we have alluded, which provides:

> "and all laws passed or attempted to be passed by such Legislature in said Territory, inconsistent with the provisions of this section, shall be null and void."

The insertion of this provision in Section 9 compels us to construe Section 9 by itself, without reference to the provision contained in Section 3, which provides:

> "That this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses."

Section 9 first contains the grant of power which extends to all rightful subjects of legislation and then modifies this grant by the many limitations contained in that section and the limitations relating to the taxing power are that all taxes shall be uniform and assessed according to value. This provision is so worded that it must be held to apply to each and

every tax, whether a license tax or any other kind of a tax, for no more comprehensive word than the word "all" could be employed by Congress in indicating what taxes these provisions should apply to.

And the further provision that no tax shall be levied for Territorial purposes in excess of 1%, or for municipal purposes in excess of 2% on the assessed valuation of property, is equally clear and explicit. In no way could Congress employ language that could more clearly indicate that taxes other than property taxes to the extent of 1% in one case and 2% in the other, were prohibited. For it is said that no tax other than those mentioned, shall be levied. The words "no tax" are as all exclusive as the words "all taxes" are all inclusive. Then follows the express provision that a law which does not comply with this particular section, Section 9, shall be void.

The degree of certainty employed by Congress in this regard appears to us to be the highest; it is at least certainty to a particular intent and may be regarded as certainty to a particular intent in every particular.

It appears to us that the Court received the wrong impression from the reading of the Organic Act and we have gone into this matter quite fully, because it was not fully presented from its various aspects upon

the hearing, and for the reasons mentioned we respectfully petition this Honoarble Court for a rehearing.

Respectfully submitted.

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J. A. HELLENTHAL hereby certifies that he is counsel for the plaintiff in error, the petitioner herein, and that in his judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.